Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
United States Department of Justice, Federal Bureau of Investigation, and Drug Enforcement Administration	)	RM-10865
	)	
	)	
Joint Petition for Rulemaking to Resolve Various Outstanding Issues Concerning the Implementation of the Communications Assistance for Law Enforcement Act	)	

REPLY COMMENTS OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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Pursuant to the *Public Notice* issued on March 12, 2004,[1] the National Cable & Telecommunications Association ("NCTA") hereby respectfully responds to comments filed in connection with the *Joint Petition* filed by the Department of Justice, the Federal Bureau of Investigation, and the Drug Enforcement Administration, as well as to the basic issues raised by the *Joint Petition* itself.[2]

SUMMARY AND INTRODUCTION

The *Joint Petition* asks the Commission to issue a declaratory ruling determining immediately – *i.e.*, without awaiting the outcome of the Commission's rulemaking on IP-Enabled Services[3] – that CALEA applies to various kinds of IP telephony (to which the *Joint Petition* refers in the aggregate as "Broadband Telephony") as well as to cable modem service and other

1 Public Notice, Comments Sought on CALEA Petition for Rulemaking, DA No. 04-700 (rel. Mar. 12, 2004).

2 DOJ, FBI & DEA, Joint Petition for Expedited Rulemaking (filed Mar. 10, 2004) ("Joint Petition").

3 IP-Enabled Services, Notice of Proposed Rulemaking, WC Docket No. 04-36, FCC 04-28 (rel. Mar. 10, 2004) ("IP-Enabled Services NPRM").

forms of high-speed Internet access (to which the *Joint Petition* refers as "Broadband Access").[4] In opening comments, communications-industry commenters almost universally urge the Commission to reject these requests.

NCTA's position is different: it supports the issuance of a declaratory ruling that providers of Broadband Telephony are properly viewed as "telecommunications carriers" for purposes of CALEA, subject to two qualifications. *First*, the Commission should include within the scope of its ruling all similarly situated providers of Broadband Telephony, including services like Vonage and CallVantage. *Second*, the Commission should make clear that, when services like Vonage and CallVantage are provided over the facilities of other companies (say, cable operators), the responsibility for complying with CALEA lies with the Broadband Telephony provider, not the facilities owner.

The declaratory ruling need not, and should not, prejudge the classification issues raised in the *IP-Enabled Services* rulemaking. CALEA defines "telecommunications carrier" differently than the Communications Act: under CALEA, the term includes any provider of "wire or electronic switching or transmission service" if the Commission finds (1) "that such service is a replacement for a substantial portion of the local exchange service" and (2) "it is in the public interest to deem such person or entity to be a telecommunications carrier for purposes of this title." 47 U.S.C. § 1001(8)(B)(ii). In connection with Broadband Telephony, the Commission can and should make those findings.

CALEA's exemption of "information services" does not mean, as some commenters suggest, that if the Commission subjects Broadband Telephony services to CALEA, it will be

4 This filing will use the Joint Petition's nomenclature.

precluded from classifying those services as information services for purposes of the Communications Act. That suggestion is wrong if for no other reason than that the Commission is free to define "information service" more narrowly under CALEA than under the Communications Act, in recognition of the two statutes' distinct purposes.

In addition, NCTA supports the issuance of an NPRM addressing whether Broadband Access should be made subject to CALEA in due course. The ultimate decision on the merits here, however, raises more complex issues. Until now, there has never been substantial reason to expect that cable modem service might ever be subjected to CALEA. Thus, there has been little investigation or debate concerning the development of CALEA-related technical requirements for the equipment that cable operators use to provide the service. Making CALEA immediately applicable to cable modem service, therefore, is neither workable nor fair.

It is clear, however, that, if the Commission eventually decides that cable modem service should be brought within CALEA's reach, it may do so without abandoning its prior holding that cable operators providing cable modem service do not provide a "telecommunications service" for purposes of the Communications Act. Just as the Commission may subject Broadband Telephony to CALEA without prejudging the classification issue under the Communications Act, so may the Commission leave its *Internet over Cable* ruling undisturbed. Earthlink's collateral attack on that ruling should be rejected.

I. THE COMMISSION MAY MAKE CALEA APPLICABLE TO BROADBAND TELEPHONY IMMEDIATELY

A. CALEA's Immediate Applicability to Broadband Telephony Is Warranted

The cable industry has long recognized that certain IP telephony services may become a replacement for some of the uses of traditional telephony, and that, at some point, providers of such services could reasonably be expected to provide efficient and effective means to allow law enforcement access to communications over such services.[5] For this reason, the cable industry, led by NCTA and CableLabs, has voluntarily sought to comply with the substance of CALEA's requirements in developing its PacketCable architecture. In particular, the industry has devoted substantial resources to developing several PacketCable Electronic Surveillance Specifications for use as "safe harbors" under 47 U.S.C. § 1006(a)(2).[6]

For the reasons set forth in the *Joint Petition*, it is imperative that law enforcement agencies remain able to acquit themselves of their duties as new technologies become available, and as more and more voice traffic migrates to IP-based networks. NCTA believes that this migration has now progressed far enough to justify CALEA's applicability. Accordingly, NCTA believes that it is appropriate for the Commission to issue a declaratory ruling, as requested by the *Joint Petition*, that providers of Broadband Telephony are properly viewed as "telecommunications carriers" for purposes of CALEA and are therefore subject to the responsibilities that this classification entails.

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5 See H.R. Rep. No. 103-827, at 9 (1994) ("House Report") (purpose of CALEA is "to preserve the government's ability . . . to intercept communications involving advanced technologies").

6 The most recent version of the PacketCable Electronic Surveillance Specification is available at http://www.packetcable.com/downloads/specs/PKT-SP-ESP-I03-040113.pdf. Prior versions, which provide safe-harbor protection to providers that have already installed equipment that is compliant with those versions, are also available on the PacketCable website. See http://www.packetcable.com.

Two qualifications, however, are in order. *First*, here as in most other areas, it is important that similarly situated parties be treated in the same way.[7] In addition, to provide clarity and certainty, it is important to define the universe of "Broadband Telephony" providers with some precision. To that end, NCTA urges the Commission to model its definition for purposes of this declaratory ruling on the four-prong test that NCTA suggested for use in the *IP-Enabled Services* rulemaking.[8] In particular, NCTA notes that the plain intent of the *Joint Petition* is to include services like Vonage and CallVantage. Those services appear to fall within the second or third baskets described in footnote 39, but, insofar as there is any doubt about that, the Commission should dispel that doubt. By doing so, the Commission will not only satisfy law enforcement's need for efficient, standardized surveillance methods, but also encourage suppliers of VoIP equipment to design equipment with CALEA compliance in mind.

Second, because some entities (say, Vonage) provide Broadband Telephony service over the Broadband Access facilities of other entities (say, cable operators), the Commission should specify in its order that, insofar as Broadband Telephony is made subject to CALEA, the entity to which CALEA obligations are being extended is the entity that offers the voice communications capability – not the owner of the underlying facilities. Under any other view, cable operators

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7 See, e.g., Environmental Action v. FERC, 996 F.2d 401, 411 (D.C. Cir. 1993) ("reasoned decision-making requires treating like cases alike") (internal quotation marks omitted); Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges, WC Docket No. 02-361, FCC 04-97, ¶ 19 (rel. Apr. 21, 2004) ("The Commission is sensitive to the concern that disparate treatment of voice services that both use IP technology and interconnect with the PSTN could have competitive implications.").

8 See NCTA, Balancing Responsibilities and Rights: Facilities-Based VoIP Competition, NCTA Policy Paper (Feb. 2004), available at http://www.ncta.com/Pdf_Files/WhitePapers/VoIPWhitePaper.pdf. NCTA has proposed that limited regulation apply to a VoIP service if "(1) it makes use of North American Numbering Plan ('NANP') resources; (2) it is capable of receiving calls from or terminating calls to the public switched telephone network ('PSTN') at one or both ends of the call; (3) it represents a possible replacement for POTS; and (4) it uses Internet Protocol transmission between the service provider and the end user customer, including use of an IP terminal adapter and/or IP-based telephone set." Id. at 4.

would become subject to obligations that are unworkable, *see infra*, p.13, and would therefore likely go unfulfilled. Rather than subjecting cable operators to such obligations due to the actions of third parties outside of their control, the Commission should impose CALEA's requirements on those parties that offer voice capabilities to end users and are therefore in the best – and perhaps only – position to implement them.[9]

B. CALEA's Statutory Language Permits the Commission To Extend CALEA's Requirements to Broadband Telephony Without Prejudging Classification Issues Raised in the Pending IP-Enabled Services Rulemaking

If the Commission decides that, as a policy matter, it is desirable to extend CALEA to Broadband Telephony, the Commission can and should do so without prejudging issues that are currently the subject of its pending *IP-Enabled Services* proceeding. As the *Joint Petition* correctly recognizes, such prejudgment is unnecessary: although there is some overlap between the statutory schemes, "the Commission can . . . find that broadband telephony providers are covered by CALEA without regard to their regulatory status under the Communications Act."[10]

1. CALEA's Statutory Language Permits the Commission To Treat Providers of Broadband Telephony as "Telecommunications Carriers" for Purposes of CALEA Even If They Are Not "Telecommunications Carriers" for Purposes of the Communications Act

Although CALEA cannot be extended to providers of Broadband Telephony unless the Commission determines that, for purposes of CALEA, they constitute "telecommunications

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9 This clarification matters because, although 47 U.S.C. § 1001(8)(B)(ii) relies on a service's characteristics to determine whether an entity is a "telecommunications carrier," 47 U.S.C. § 1002(a) imposes obligations on telecommunications carriers with respect to their "equipment, facilities, or services." This may create ambiguous responsibilities when the FCC deems an entity to be a "telecommunications carrier" for purposes of CALEA pursuant to the powers granted it in 47 U.S.C. § 1001(8)(B)(ii), as proposed in the Joint Petition.

10 Joint Petition at 30; see also Communications Assistance for Law Enforcement Act, Second Report and Order, 15 FCC Rcd 7105, ¶ 13 (1999) ("the entities and services subject to CALEA must be based on the CALEA definition . . . , independently of their classification for the separate purposes of the Communications Act").

carriers,"[11] CALEA defines that term differently than the Communications Act. Under the Communications Act, the Commission has interpreted "telecommunications carrier" to be essentially limited to firms that provide "telecommunications service" on a common carrier basis.[12] CALEA likewise brings common carriers within its reach, *see* 47 U.S.C. § 1001(8)(A), but contains an additional clause applicable to firms that are not telecommunications carriers for purposes of the Communications Act, *see id.* § 1001(8)(B). This second clause empowers the Commission to bring within CALEA's reach any "person or entity engaged in providing wire or electronic communication switching or transmission service," if the Commission makes two findings: (1) "that such service is a replacement for a substantial portion of the local telephone exchange service," and (2) "that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of this title." *Id.*

The Commission plainly has authority to place providers of Broadband Telephony within this second CALEA basket. The electronic processes that take place within, say, soft switches used by providers of VoIP service can reasonably be described as "electronic communication switching."[13] No one can seriously doubt that the Commission could reasonably find that subjecting these services to CALEA serves the "public interest" by facilitating law enforcement's

11 See, e.g., 47 U.S.C. § 1002(a) (making CALEA's substantive requirements applicable only to "a telecommunications carrier").

12 See generally Virgin Islands Tel. Corp. v. FCC, 198 F.3d 921 (D.C. Cir. 1999) (upholding that reading).

13 The ISP CALEA Coalition argues (at 18-19) that "switching" in CALEA cannot be interpreted to cover "packet-mode switching." But, at the time CALEA was enacted, incumbent LECs and others were already widely employing packet-switching. There is no indication that Congress intended to exclude this form of "switching" when it used the term in Section 1001(8)(B)(ii).

assigned duties,[14] and it is the Commission's prerogative to determine whether that benefit outweighs the accompanying costs.

In addition, IP-based voice services can plainly be viewed as "a replacement for a substantial portion of the local telephone exchange service." The Commission need not, as some commenters suggest,[15] conduct a detailed examination of market penetration on a state-by-state, or exchange-by-exchange basis, in order to find this standard satisfied. Because sophisticated criminals and terrorists can be expected to select the least interceptable means of communications, the Commission would stay well within its interpretive discretion under *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), if it were to find that even services with a small market share can constitute "a replacement for a substantial portion of the local telephone exchange service."[16]

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14 See House Report at 21 ("As part of its determination whether the public interest is served by deeming a person or entity a telecommunications carrier for the purposes of this bill, the Commission shall consider whether such determination would . . . protect public safety and national security."); see also Joint Petition at 22, 25, 31 (describing benefit to law enforcement). To be clear, the precise public interest determination that the Commission must make is not whether electronic surveillance would further public safety and national security; law enforcement is entitled to conduct electronic surveillance whether CALEA applies or not. Rather, the issue is whether VoIP has replaced traditional telephony to such an extent that law enforcement should be able to conduct surveillance in a manner that is standardized through industry-wide technical specifications.

15 See AT&T Comments at 16-17; Center for Digital Democracy Comments at 12-15; Sprint Comments at 9 n.5; USTA Comments at 4; TIA Comments at 24; MCI Comments at 19-20; ISP CALEA Coalition Comments at 19-21.

16 Contrary to the unsupported suggestion of some commenters, the Commission's "replacement" standard for CALEA purposes need not be identical to its "replacement" standard for purposes of 47 U.S.C. § 332(c)(3)(A)(ii). The purpose of Section 332(c)(3)(A) is to ensure that CMRS service is free from unnecessary rate regulation – a purpose that is served by reading the "replacement" standard to require that CMRS's telephony share has grown to such an extent that it faces no effective competition. By contrast, CALEA's purpose is to ensure that law enforcement can conduct surveillance in an efficient and standardized manner — a purpose that is served by reading the "replacement" standard to require only that sufficient surveillable traffic has migrated as to warrant standardized surveillance. Given the different purposes, different readings are permissible. See infra, pp. 11-12.

2. CALEA's "Information Services" Exemption Is No Bar to Extending CALEA's Requirements to Broadband Telephony Services Even If Such Services Are "Information Services" for Purposes of the Communications Act

Arguing that CALEA denies the Commission authority to treat as a "telecommunication carrier" any "persons or entities insofar as they are engaged in providing information services,"[17] various commenters assert that the Commission cannot bring Broadband Telephony within CALEA's reach unless the Commission also determines that Broadband Telephony does not fit the definition of "information service" for purposes of the Communications Act,[18] which would prejudge a key issue in the *IP-Enabled Services* proceeding.[19] These commenters argue that, because CALEA defines the term "information service" in a way that is almost identical to the definition Congress added to the Communications Act two years after it enacted CALEA, the Commission must construe the two terms in precisely the same way.[20]

No commenter argues that Broadband Telephony services are captured by CALEA's definition of "information services" as a matter of *Chevron* "step one." Nor would such an argument be plausible: CALEA no more compels any single answer to the question whether Broadband Telephony constitutes an "information service" than the Communication Act compels a single answer to the question whether cable modem service constitutes a "telecommunications service."[21] Thus, the argument must be based on the premise that the Commission is legally

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17 See 47 U.S.C. § 1001(8)(C)(i).

18 See, e.g., AT&T Comments at 12-16; VON Comments at 12-13; ISP CALEA Coalition Comments at 15-17; Sprint Comments at 8; Internet Commerce Coalition Comments at 8-9.

19 IP-Enabled Services NPRM ¶ 43.

20 See, e.g., Earthlink Comments at 4 ("An 'information service' under the Communications Act by definition also constitutes 'information services' under CALEA.").

21 See Inquiry Concerning the High-Speed Access to the Internet over Cable and Other Facilities, Internet over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet over Cable Facilities, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶¶ 39-40 (2002).

required to exercise its *Chevron* "step two" discretion under CALEA in precisely the same way as it has exercised that discretion under the Communications Act.

But that (silent) premise is contrary to settled principles of administrative law. Under *Chevron* step two, the Commission may – indeed, must – interpret an ambiguous statutory term in a way that suits the statute's context and purpose.[22] Thus, where even identically phrased statutes have different contexts and purposes, the Commission must take the difference into account and may make it the basis for a different conclusion.[23]

CALEA's purpose is unquestionably distinct from that of the Communications Act. Whereas the purpose of CALEA is to ensure that law enforcement can efficiently conduct authorized surveillance, the purpose of the Communications Act (insofar as relevant) is to regulate the exercise of market power and to promote competition and new technologies and services. Taking into account the difference in purposes, the Commission may answer the question whether Broadband Telephony constitutes an "information service" differently under CALEA than it answers that question under the Communications Act.

In particular, CALEA's purpose may not be well-served served by unthinkingly importing the Commission's practice under the Communications Act of treating integrated services – *i.e.*,

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22 See, e.g., AT&T Corp v. Iowa Utils. Bd., 525 U.S. 366, 391-92 (1999) (47 U.S.C. § 251 "requires the Commission to determine on a rational basis which network elements must be made available, taking into account the objectives of the Act"); id. at 388 ("the Act requires the FCC to apply some limiting standard, rationally related to the goals of the Act"); GTE Service Corp. v. FCC, 224 F.3d 768, 772 (D.C. Cir. 2000) ("under Chevron step two we will defer to the agency's interpretation of the Act if it is reasonable in light of the text, the structure, and the purpose of the Act").

23 See, e.g., General Dynamics Land Sys., Inc. v. Cline, 124 S. Ct. 1236, 1245 n.8 (2004) ("The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them . . . has all the tenacity of original sin and must constantly be guarded against.") (internal quotation marks omitted); Weaver v. USIA, 87 F.3d 1429, 1437 (D.C. Cir. 1996) ("[i]dentical words may have different meanings where the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different") (internal quotation marks omitted), cert. denied, 520 U.S. 1251 (1997).

services that combine telecommunications with information retrieval or protocol conversion – as "information services."[24] That practice is a perfectly appropriate way of effectuating the Communications Act's policy to avoid burdening non-dominant providers of integrated services with a broad range of unnecessary Title II requirements.[25] But that policy is not implicated by CALEA, and CALEA's own purpose – ensuring the efficient conduct of lawful surveillance – may be stymied if services are exempted simply because, say, they involve some measure of protocol conversion. Thus, the Commission would not act unlawfully if it chose to draw the line between telecommunications and information in different places under the two different statutes.

II. THE COMMISSION SHOULD EXPEDITIOUSLY EXAMINE ISSUES RELATED TO EXTENDING CALEA TO BROADBAND ACCESS SERVICE

A. For the Reasons Set Forth in the Joint Petition, Expeditious Issuance of an NPRM Concerning CALEA's Applicability to Broadband Access Service Is Warranted

NCTA also supports the *Joint Petition*'s request that the Commission initiate a rulemaking concerning the applicability of CALEA's requirements to Broadband Access services, which, in the *Joint Petition*'s definition, include cable modem service.[26] In particular, the Commission should consider whether it is necessary to demand full CALEA compliance of all Broadband Access providers. To study these questions, expeditious issuance of an NPRM is appropriate.

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24 See Inquiry Concerning the High-Speed Access to the Internet over Cable and Other Facilities, Internet over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet over Cable Facilities, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶ 7 (2002) ("cable modem service . . . is properly classified as an interstate information service"); Federal-State Joint Board on Universal Service, Report to Congress, 13 FCC Rcd 11501, ¶ 73 (1998) ("We find that Internet access services are appropriately classed as information, rather than telecommunications services.") ("Report to Congress").

25 See Report to Congress ¶ 46 ("an approach in which a broad range of information service providers are simultaneously classed as telecommunications carriers, and thus presumptively subject to the broad range of Title II constraints, could seriously curtail the regulatory freedom that the Commission concluded in Computer II was important to the healthy and competitive development of the enhanced services industry").

NCTA doubts, however, that it would be either workable or fair to make CALEA applicable to cable modem service while those questions are still being debated. As a purely practical matter, for example, prior to the *Joint Petition*, there was no substantial reason to expect that CALEA would ever apply to cable modem service. Thus, there currently are no CALEA standards for the Cable Modem Termination Systems and other equipment that cable operators use to provide the service, and there has been little investigation or debate concerning the question how CALEA might be applied to such equipment. Accordingly, applying CALEA to cable modem service immediately might unfairly hold cable operators to an unattainable standard.

B. Treating Broadband Access as an Information Service Under the Communications Act Does Not Prejudge the CALEA Inquiry

Earthlink argues that, before the Commission may impose any CALEA-related requirements on providers of cable modem service, the Commission must first repudiate its prior ruling that, for purposes of regulation under the Communications Act, cable operators providing cable modem service do not provide a "telecommunications service." Earthlink argues that the Commission is powerless to address the concerns raised by the *Joint Petition* unless it "reverses" its prior ruling and "recognizes that the broadband transmission component of broadband Internet access service is a 'telecommunications service,' not an 'information service.'" Earthlink Comments at 5 (emphasis in original). The Commission can accomplish this, Earthlink suggests (at 6), by "announcing that it will not seek a writ of certiorari with respect to the Ninth Circuit's Brand X decision."

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26 See Joint Petition at 15, 22, 23-28.

Earthlink's argument plainly is not inspired by legitimate CALEA-related concerns. Earthlink apparently believes that, by taking the position that CALEA cannot be made applicable to cable modem service so long as the service is classified as an "information service" for purposes of the Communications Act, it will increase the odds that the Commission will decline to seek certiorari in the *Brand X* case in which Earthlink is one of the private litigants.

But Earthlink is wrong. Just as a Commission determination that Broadband Telephony services fall within the "telecommunications carrier" definition of Section 1001(8)(B)(ii) would not prejudge the classification issues raised in the pending *IP-Enabled Services* rulemaking, neither does the conclusion that providers of Broadband Access services are providers of "information services" for purposes of the Communications Act prejudge where they fall under CALEA. The two statutory inquiries are separate because, as noted above, the two statutes effectuate different policies, and so may – indeed, probably should – be interpreted differently.[27]

27 Although the matter should be addressed in greater detail in the proposed rulemaking proceeding, it would appear that Internet access, which principally offers subscribers the ability to retrieve information from the Internet, is precisely the kind of service that Congress did not wish to be regulated, whether under the Communications Act or CALEA. It therefore seems likely that the inquiry under 47 U.S.C. § 1001(8)(B)(ii) will yield distinct answers for Broadband Telephony offerings, on the one hand, and Broadband Access offerings (such as cable modem service), on the other.

CONCLUSION

For the reasons set forth above, the Commission should grant the *Joint Petition* in part.

Respectfully submitted,

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